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BEFORE THE ARIZONA CORPORATION COMMISSION

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PAUL NEWMAN  
COMMISSIONER

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COMMISSIONER

BOB STUMP  
COMMISSIONER

IN THE MATTER OF THE ) DOCKET NO. E-20690A-09-0346  
APPLICATION OF SOLARCITY )  
FOR A DETERMINATION THAT ) SOLARCITY'S EXCEPTIONS TO THE  
WHEN IT PROVIDES SOLAR ) RECOMMENDED OPINION AND  
SERVICE TO ARIZONA SCHOOLS, ) ORDER  
GOVERNMENTS, AND NON- )  
PROFIT ENTITIES IT IS NOT )  
ACTING AS A PUBLIC SERVICE )  
CORPORATION PURSUANT TO )  
ART. 15, SECTION 2 OF THE )  
ARIZONA CONSTITUTION )

SolarCity Corporation ("SolarCity"), by and through its undersigned counsel, hereby files its Exceptions to the Recommended Opinion and Order (the "ROO") issued in the above referenced matter.

Arizona Corporation Commission  
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1 **I. Introduction**

2 SolarCity is a full service solar installation business that provides customers with design,  
3 installation, maintenance and financing of solar services and equipment. The company has been  
4 operational in Arizona since 2008 and has installed approximately 900 solar systems in the state.  
5 SolarCity has three offices in Arizona – two in Phoenix and one in Tucson. These serve as the  
6 base for the company's 100 in-state employees.

7 SolarCity has worked extensively with Arizona schools, governments and nonprofit  
8 entities to find a way for them to utilize solar energy and save millions on electricity bills. For  
9 schools, going solar can result in a savings of millions of dollars that can then be reinvested back  
10 in the school to improve student education. However, solar equipment that is comparatively  
11 affordable for for-profit entities due to Federal tax credits, grants in lieu of credits, and  
12 depreciation credits (collectively referred to herein as the "tax credits") can be prohibitively  
13 expensive for nonprofit organizations without a tax burden.

14 SolarCity offers a number of different financing options to its customers. One of these  
15 options is known as a solar service agreement ("SSA"), designed to provide a means for  
16 nonprofits to realize the significant benefits that result from Federal tax incentives. Government  
17 tax credits represent such a significant proportion of a system's value that the *only* way a not-for-  
18 profit can acquire solar at an affordable price is through an SSA or similar arrangement.

19 The issue in this case is whether or not SolarCity becomes a regulated public service  
20 corporation simply by utilizing this financing arrangement in its dealings with schools,  
21 governments and other nonprofit entities.

22 Despite the fact that the SSA is merely a financing tool that SolarCity uses to provide  
23 solar to schools and other nonprofits, the ROO concludes that when SolarCity enters into an SSA  
24 it becomes a public service corporation that the State needs to regulate for the sake of public  
25 protection. This conclusion is based on faulty reasoning and a misapplication of the law.  
26 Accordingly, we request that the Commission adopt the Amendments to the ROO attached  
27 hereto as Exhibit 1.  
28

## II. What is an SSA?

An SSA is an agreement between a company (i.e. SolarCity) and its customer whereby the company designs, installs, maintains, and finances solar equipment and services at no up-front cost to the customer. *See* Ex. A-1 at Ex. B at Ex. 7. Importantly, SSAs allow nonprofit customers to monetize the Federal tax credits that make solar affordable. SSAs cover a wide variety of non-power contractual terms (including equipment operations and maintenance,) and they provide customers with an option to buy the system at different periods during the contract. *See Id. See also*; Ex. A-5 at 7:23-27.

In fact, to a nonprofit customer, the only difference between an SSA and any other financing mechanism available is the fact that an SSA allows the nonprofit to take advantage of Federal tax credits. The chart attached in Exhibit 2 details several purchase and financing options available to nonprofit customers. It clearly illustrates that the sole difference between an SSA and every other financing option is the utilization of the tax credits.

Under an SSA, the customer pays for all of the solar services provided by the installation company. The amount paid is based upon the electricity the system produces. SSAs are only priced in this way because the Federal Tax Code requires such pricing in order for tax credit to be utilized. *See* Ex. A-4 at Q. 11.

The ROO's examination essentially stops when it concludes that the SSA has provisions for the sale of electricity.<sup>1</sup> It proposes an unwarranted extension of the regulation of conventional monopoly electric power. Furthermore, the ROO proposes to selectively enact Commission regulation over SSA providers and not other solar providers. It also proposes, without a public policy justification, to extend Commission jurisdiction into a business arena where possible scenarios to inflict public harm are already deeply regulated by other state agencies, and further circumscribed by competition. Even in its initial analysis, the ROO ignores the overarching purpose and reason why SolarCity and nonprofits enter into SSAs in the first instance.

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<sup>1</sup> Although SolarCity does not address the issue in this filing, nothing contained herein should be construed as constituting a waiver of any argument that SolarCity is not furnishing electricity.

1 **III. SolarCity is not a public service corporation when it utilizes a solar service agreement**  
2 **to provide solar services and equipment to schools, governments and non-profits.**

3 The issue in this matter is whether SolarCity is a public service corporation when it enters  
4 into solar service agreements with schools, governments, and other nonprofit entities. The  
5 ROO's position is that the primary purpose of an SSA is to "furnish" electricity. Proceeding  
6 from this flawed conclusion and more or less summarily dispensing with all other considerations,  
7 the ROO proposes to determine that SolarCity must be a public service corporation when it  
8 enters into SSAs with schools, governments, and other nonprofit entities.

9 The ROO's logic is flawed because it wrongly focuses a single term of the SSA  
10 document in and of itself instead of on the reason why SolarCity and the schools use the SSA as  
11 an alternative to the many other financing options available.

12 Under Arizona law, the evaluation of whether or not an entity is a public service  
13 corporation is a two-step process. First, the inquiry determines if the entity actually furnishes  
14 electricity. See *Southwest Transmission Cooperative ("SWTC") v. Arizona Corp Comm*, 213  
15 Ariz. 427, 430, 142 P.3d 1240, 1243 (App. 2007). If the entity furnishes electricity then the next  
16 question becomes one of the public interest. See *Id.* This second part of the analysis ensures that  
17 the Commission does not assert jurisdiction over entities that furnish electricity in a manner that  
18 is merely incidental to some other purpose over which the Commission does not have  
19 jurisdiction. See *General Alarm Inc. v. Underdown*, 76 Ariz. 235, 238, 262 P.2d 671, 673 (S.Ct.  
20 1953). Arizona Courts have prescribed a series of factors that are designed to limit the definition  
21 of a "public service corporation" to those specific and limited types of utility businesses where  
22 the Commission's extraordinary powers in restraint of commerce are strictly necessary for the  
23 public good.

24  
25 To be a "public service corporation," an entity's "business and activities must be  
26 such as to make its rates, charges and methods of operation, a matter of public  
27 concern, clothed with a public interest to the extent contemplated by law which  
28 subjects it to governmental control--its business must be of such a nature that  
competition might lead to abuse detrimental to the public interest.".... The fact  
that an entity may incidentally provide a public commodity is not sufficient to  
subject it to regulation, it must be in the business of providing a public service.

1 *SWTC*, 213 Ariz. at 431-432, 142 P.3d at 1244-1245 (citing *Trico Elec. Coop., Inc. v.*  
2 *Corp. Comm'n*, 86 Ariz. 27, 34-35, 339 P.2d 1046, 1052 (1959) (citing *Gen. Alarm*, 76  
3 Ariz. 235, 262 P.2d 671)) (citing *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818; *Gen.*  
4 *Alarm*, 76 Ariz. at 239, 262 P.2d at 673.)

5 The ROO determines that SolarCity is furnishing electricity but fails to properly establish  
6 why or for what purpose SolarCity is furnishing that electricity. The ROO then proposes a  
7 tenuous definition of the “public interest” and “public service” that are astonishingly and  
8 unprecedentedly broad. The result of this inaccurate definition would serve to extend the  
9 Commission’s regulation over a variety of private activities without consideration as to whether  
10 this regulation is, in fact, necessary or desirable.

11  
12 **1. Because it focuses only on a single term of the SSA instead of the reason why the**  
13 **SSA is employed, the ROO mistakenly concludes that SolarCity’s primary purpose is the**  
14 **sale of electricity.**

15 The ROO wrongly focuses on the question of *what* a single provision of the SSA does  
16 without also looking at the more important and legally relevant question of *why and for what*  
17 *purpose* SolarCity uses the SSA. Because SolarCity employs SSA financing and it includes a  
18 provision (only one of many provisions) for the sale of electricity, the ROO concludes that  
19 SolarCity’s *primary purpose* is to sell electricity. The problem with this analysis is that it fails to  
20 take into account the overarching reason that SolarCity utilizes the SSA, which is, in fact, the  
21 company’s actual primary purpose.

22 Traditionally, courts do not consider one isolated aspect of an entity’s business in  
23 determining the entity’s primary purpose. Rather, courts look at the business as a whole to  
24 determine its primary purpose. In *Nicholson*, the entity in question furnished water to the public  
25 to consume and use for domestic purposes. See *Arizona Corp Comm. v. Nicholson*, 108 Ariz.  
26 317, 320, 497 P.2d 815, 818 (S.Ct. 1972). It was appropriate for the Court to go beyond just  
27 asking *what* the entity did in one isolated aspect of its business (furnishing water) to consider  
28

1 why the entity furnished the water. The Supreme Court concluded that the primary purpose was  
2 to sell lots in a trailer park, not to furnish water. *See Id.*

3 Similarly, the Court in *General Alarm* found that the entity in question used telephone  
4 wires to convey messages. However, the Court looked beyond *what* the entity did to ask *why*  
5 they did it. *See General Alarm*, 76 Ariz. at 239, 262 P.2d at 673. The Court found that the  
6 company used telephone wires to convey messages that provided alarm services in order to  
7 protect private property. *See Id.*

8 In this case, the ROO conflates the fact that a term is essential to an agreement with the  
9 primary purpose of the business. The ROO concludes that the sale of electricity is “critical to  
10 [the SSA’s] viability” and therefore is SolarCity’s primary purpose. *See ROO* at 25:5. But  
11 *Nicholson* proved that this is not the correct test. With regards to the service of water, the  
12 *Nicholson* Court found that “it is conceded that without this water plaintiffs could not stay in the  
13 business, but the fact remains that the furnishing of water is in support and incidental to  
14 plaintiffs’ business of renting trailer spaces.” *Nicholson* 108 Ariz. at 320, 497 P.2d at 818.

15 The SSA has a number of essential terms, including those relating to the sale of the  
16 equipment in question, but, in its effort to bolster its case for regulation, the ROO does not  
17 consider any of these terms as affecting SolarCity’s primary purpose. If the SSA is a contract to  
18 sell electricity, as the ROO contends, the SSA is also undeniably a contract for the design of  
19 solar equipment; a contract for the installation of solar equipment; a contract for the ongoing  
20 maintenance of solar equipment; and a contract for the financing of solar equipment and  
21 services. Each of these terms are equally critical to the SSA’s viability but the ROO never  
22 contends that any of these other indispensable terms are the primary purpose of the SSA.

23 What, then, is SolarCity’s purpose in employing the SSA as a form of financing?  
24

25 **2. SolarCity’s primary purpose in using the SSA is to design, install, maintain and**  
26 **finance solar equipment.**

27 SolarCity’s primary purpose is to design, install, maintain, and finance solar equipment.  
28 In the case of a limited number of nonprofit customers, the company must use an SSA to

1 monetize Federal tax credits that make this installation of solar equipment economically  
2 attractive to the customers. *See* Ex. A-5 at 4:25-28. This is a special use of a specific contractual  
3 mechanism that is rather extraordinary as compared to the many thousands of solar systems that  
4 SolarCity has installed to date, as a key component of its core business, under either cash sale or  
5 lease arrangements. SolarCity's CEO, Mr. Rive, stated:

6  
7 You have to understand that there is simply no other economically viable way for  
8 schools, non-profits and governmental entities to utilize our unregulated services  
9 that we provide all over the state unless they use the SSA. All SolarCity is doing  
10 is trying to provide this class of non-profit customers with its core, unregulated  
11 services. If it means we somehow end up furnishing electricity then that is purely  
12 incidental. SolarCity never decided to change its business plan and start selling  
13 electricity. Instead, SolarCity tried to figure out a way to bring this class of non-  
14 profit customers its legal services and the SSA is the only way to do that. We  
15 have no reason to change our business plan as we have been highly successful. If  
16 we are furnishing electricity, which I do not agree with, it is merely incidental to  
17 us utilizing the only viable way to provide the unregulated services the non-profit  
18 group can benefit from.

19 Ex. A-4 at 5:28-6:12

20 SolarCity's customers agree that the SSA is a financing tool above all else. Scottsdale  
21 Unified School District, Deputy Superintendent David Peterson testified:

22 ...everyone has to remember that there is no other economically viable way for us  
23 to make this work. If SUSD could purchase the system or lease it while taking  
24 advantage of the substantial tax incentives we would explore that but as has  
25 already been explained that does not work because of our tax exempt status. All  
26 SUSD wants are the services that SolarCity provides without regulation in this  
27 State right now which are design, installation, and maintenance of the system with  
28 no upfront costs. Because we are a school the only way we can get these services  
at a price that makes sense is through a SSA....If SUSD buys the panels then  
SUSD needs to come up with approximately \$10 million dollars just to install the  
solar system for the two schools. The SSA allows us the opportunity to get the  
solar panels in place and to begin saving money without spending anything up  
front. We are using SolarCity to raise the upfront costs for us and are paying for  
that based on the savings we ultimately receive from their installation. That is  
"financing" in its most basic sense."

Ex. A-5 at 13:1-20

1 Giving nonprofit entities the ability to monetize Federal tax incentives is the sole reason  
2 that SolarCity utilizes SSAs. Were this not a primary concern, the school could and would  
3 purchase solar equipment and services with cash, finance it with debt, sell bonds, or lease  
4 equipment (see Exhibit 2) and in every case, the school would obtain the same equipment and  
5 services while forfeiting the benefit of the tax credits. As Mr. Peterson states above, the only  
6 reason an SSA is used is because it is the only option that allows the school to monetize tax  
7 credits. It is only incidental to the school's rational decision to take advantage of available tax  
8 credits that there is any provision of electricity at all.

9  
10 **3. The ROO is mistaken about *Serv-Yu*'s role; *Serv-Yu* analysis is required; under**  
11 ***Serv-Yu*, SolarCity is not a public service corporation.**

12 Arizona case law makes perfectly clear that an analysis of public interest using *Serv-Yu*-  
13 like factors is an essential second step in the analysis of whether or not a company is furnishing  
14 electricity under Article 15, Section 2. See *SWTC*, 213 Ariz. at 430, 142 P.3d at 1243. The ROO  
15 wrongly concludes that in every contract where a given party, as a necessary term of the contract,  
16 generates electricity in any form and then transfers ownership of that electricity, that ACC  
17 jurisdiction is both necessary and Constitutionally mandated, with *no further analysis required*.  
18 The ROO states that it is not necessary to perform the *Serv-Yu* analysis because it has already  
19 determined, without *Serv-Yu*, that furnishing electricity is SolarCity's primary purpose.  
20 However, such an analysis is explicitly designed, and the courts have used it, to determine  
21 whether the furnishing of electricity is merely incidental to SolarCity's primary purpose. See  
22 *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818. Not only does this beg the question, but it is  
23 contrary to Arizona law. Just four years ago, the State's Court of Appeals reiterated that  
24 "determining whether an entity is a public service corporation *requires* a two-step analysis." See  
25 *SWTC*, 213 Ariz. at 430, 142 P.3d at 1243. When *Serv-Yu* is properly applied, it is clear that  
26 SolarCity is not a public service corporation.

27 Under *Serv-Yu*, there are 8 factors to be analyzed. Under the balance of these factors it is  
28 clear that SolarCity is not a public service corporation.



1           **a) Serv-Yu Factor 1: What does the entity actually do?**

2           As discussed above, SolarCity is in the business of designing, installing, maintaining and  
3 financing solar equipment. The ROO's conclusion on the first *Serv-Yu* factor is based on the  
4 faulty deduction that because a SSA includes provisions for the sale of electricity, SolarCity's  
5 primary business is the sale of electricity. Again, the ROO focuses on a specific term of the  
6 agreement rather than on the agreement as a whole. In fact, in reaching its faulty conclusion  
7 under this factor, the ROO states that, "the entire purpose of the structure of the SSA contract is  
8 to sell electricity." ROO at 31:11,12. This is simply incorrect. In fact, the ROO even  
9 acknowledges that SolarCity provides a number of other services through the SSA. *See* ROO at  
10 24:7-8. The ultimate question under this factor is not what a SSA agreement does but instead,  
11 what SolarCity, the entity to be regulated, does. The long list of what SolarCity provides under  
12 an SSA has been discussed above and demonstrates that on the whole what SolarCity does is  
13 provide design, installation, maintenance and financing of solar equipment and services.

14  
15           **b) Serv-Yu Factor 2: Is the entity's property dedicated to a public use?**

16           It is clear SolarCity *does not* intend to dedicate its property to a public use. SolarCity's  
17 intent upon entering into an SSA is merely to provide schools with the same equipment and  
18 services that other types of customers can receive from SolarCity (see Exhibit 2 for examples)  
19 while allowing schools to take advantage of otherwise stranded Federal tax credits. Again, based  
20 on the faulty premise that SolarCity's *purpose* is to furnish electricity, the ROO reasons that  
21 "through its SSA business, SolarCity holds itself out as furnishing its electricity [ ] to the public  
22 at large [ ]. Thus, SolarCity has demonstrated the requisite intent to dedicate its property to  
23 public use." ROO at 37:5-8. In fact, SolarCity does not currently and has never previously held  
24 itself out as having the intent to furnish electricity to anyone. SolarCity's intent is to find a way  
25 for schools to receive all of the same services and equipment as other customers, all at a  
26 reasonable price. Any furnishing of electricity is merely incidental to the financing structure  
27 employed.

1 The ROO further attempts to support its conclusion with the false declaration that when  
2 SolarCity provides solar services to schools, “the activity is integral to providing reliable  
3 electricity to the public.” ROO at 37:10,11. This is a false and misleading statement. There is  
4 nothing in the record to support the statement that the provision of service under SSAs is  
5 “integral to providing reliable electricity to the public.” Any conclusion that SolarCity is  
6 dedicating its property to a public use because its property is “integral to providing reliable  
7 electricity to the public” is unequivocally wrong and must be rejected.

8  
9 **c) Serv-Yu Factor 4: Does the entity deal with a commodity in which the public has**  
10 **been held to have an interest?**

11 The ROO holds that SolarCity deals with a commodity in which the public has been held  
12 to have an interest because solar panels generate renewable electricity and the public has been  
13 held to have an interest in electricity, and in renewable energy in general. In effect, the ROO  
14 collapses this factor down to the question of whether or not SolarCity furnishes electricity, which  
15 of course was already answered in the affirmative, otherwise the *Serv-Yu* factors would not need  
16 to be analyzed in the first place. Either this factor means something other than what the ROO  
17 suggests or the Court saw fit to include a factor that was meaningless and redundant.

18 To describe, as the ROO does the provision of any electricity, anywhere, under any  
19 contractual arrangement as a “commodity in which the public has been held to an interest”  
20 simply by the fact that there is a regulation designed to encourage its deployment would seem to  
21 expand the Commission’s jurisdiction far beyond its current oversight over only a limited part of  
22 the economy.

23 The fact is that SolarCity does not provide the public with a commodity of compelling  
24 public interest, but an interest which can hardly be described as “essential” when that term is  
25 considered within the context of the Commission’s *raison d’etre*. SolarCity provides the public  
26 with purely elective distributed solar equipment and services and also provides specialized  
27 financing services for schools. The effect of a cessation of SolarCity’s services or equipment  
28

1 cannot be seriously compared to the effects that would ensue if a regulated utility were to cease  
2 operations.

3 Further, it is clear no one can be forced to enter into an SSA with any solar company.  
4 SolarCity is not alone in this reasoning. When an Administrative Law Judge for New Mexico's  
5 Public Utilities Commission was faced with this same issue in case 09-00217-UT, the Judge  
6 concluded that "while developers provide services related to essential public services, they do  
7 not provide essential public services themselves. Developers provide hosts a green alternative.  
8 Hosts who receive service from developers do so because they have determined that the service  
9 is to their benefit not because they have no other choice." Ex. SunPower-3 at 16.

11 **d) Serv-Yu Factor 5: Is the entity a monopoly or does the entity intend to become a**  
12 **monopoly?**

13 It is clear in the record that SolarCity is not a monopoly and does not intend to be a  
14 monopoly.<sup>2</sup> The ROO concedes this, but goes to great lengths to argue that despite this fact,  
15 SolarCity still needs to be regulated. See ROO at 47:11,12.

16 The purpose of this factor is to determine if the public needs to be protected from  
17 monopoly providers of essential services in order to ensure reliable service at a fair price.  
18 Knowing that SolarCity is not, and cannot become, a monopoly, the ROO turns this factor on its  
19 head in an effort to bolster its argument for regulation. The bottom line is that the public does  
20 not have a monopolistic concern regarding SolarCity's business.

22 **e) Serv-Yu factor 6: Does the entity accept substantially all requests for service?**

23 SolarCity agrees with the ROO that SolarCity does not and cannot accept substantially all  
24 requests it receives for service and that this factor weighs in favor of SolarCity and against  
25 regulation.

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26  
27 <sup>2</sup> In this section the ROO includes the statement that, "[i]n this case, this factor is not helpful in the determination of whether  
28 SolarCity is supplying a public commodity." ROO at 47:9,10. The question at hand in *Serv-Yu* has nothing to do with if  
SolarCity is supplying a public commodity and that question is just a restatement of the step one Constitutional question of  
whether the entity is furnishing electricity. This conclusion begs the question; is the ROO even using *Serv-Yu* correctly?

1                   **f) Serv-Yu Factor 7: Does the entity provide service under contracts?**

2                   SolarCity agrees with the ROO that this factor favors SolarCity and weighs against  
3 regulation. In an attempt to bolster its argument for regulation, the ROO attempts to diminish the  
4 fact that service is provided under contracts by pointing out that incumbent “utilities serve  
5 certain customers under special contracts.” ROO at 51:13,14. It is important to point out that *all*  
6 of SolarCity’s customers are served under a separately negotiated special agreement with several  
7 unique terms. There is a significant difference between offering “certain” customers and  
8 offering “all” customers service under contracts. SolarCity believes this significant difference  
9 requires that greater weight be given to this factor than the ROO suggests.

10                  The fact that SolarCity’s contracts tend to adhere to a common template is utterly  
11 irrelevant. Throughout corporate law, many types of agreements take effectively standard  
12 “boilerplate” forms with no effect on whether these corporations are to be considered public  
13 service entities.

14  
15                   **g) Serve-Yu Factor 8: Does the entity compete with other public service**  
16 **corporations?**

17                  SolarCity agrees with the ROO that this factor weighs in favor of SolarCity and against  
18 regulation and agrees that, like other factors in this analysis, the result of the analysis could  
19 change as circumstances change over time. However, a decision to regulate cannot be made  
20 based on an imaginary future fact pattern.

21  
22                   **h) Serv-Yu Conclusion**

23                  When the *Serv-Yu* analysis is performed with a proper understanding of the reasons  
24 SolarCity uses SSAs to provide solar equipment and services to schools, the unavoidable  
25 conclusion is that SolarCity is not a public service corporation.

26  
27                   **4. SolarCity is already subject to regulation designed to protect the public and no**  
28 **additional regulation is necessary.**

1 SolarCity is already subject to regulations that ensure its solar equipment does not  
2 negatively impact the grid, the public at large, or its customers. The second step of the  
3 constitutional analysis requires that *Serv-Yu* is used to understand the potential reasons that the  
4 public interest may mandate regulation in a given scenario. Arizona courts have carefully  
5 circumscribed the extraordinary powers the ACC exercises over its limited sectors of the  
6 economy by finding that, to be a public service corporation, a “business must be of such a nature  
7 that competition might lead to abuse detrimental to the public interest.” *SWTC* 213 Ariz. at 431-  
8 432, 142 P.3d at 1244-1245 (citing *Trico Elec.* 86 Ariz. at 34-35, 339 P.2d at 1052 (citing *Gen.*  
9 *Alarm*, 76 Ariz. 235, 262 P.2d 671)).

10 The ROO does not make any effort to show why the numerous protections and  
11 regulations that exist in general business regulation and the technological restrictions pertaining  
12 to the grid are inadequate to safeguard the public, the grid, and customers. Such safeguards have  
13 been perfectly adequate and effective when, in a similar circumstance to an SSA, the same  
14 equipment is leased by the company to, for instance, a small for-profit customer. The ROO  
15 appears to select SSA providers for special regulation because an argument can be made that the  
16 Commission *can* do so, with scant consideration of whether there is any justification as to *why*.

17 SolarCity, in its limited function as a SSA provider, and together with all other solar  
18 leasing or sale providers, is already subject to a comprehensive set of regulations that provide all  
19 necessary or justifiable consumer, grid, and public protection, and which can be extended and  
20 updated within their current jurisdictional oversight if they should prove inadequate in the future.

21  
22 1) The Commission’s Interconnection Document and individual utilities’ interconnection  
23 standards. The Interconnection Document controls every solar facility that is interconnected to  
24 the grid and ensures that extensive safety protocols are followed. See Exhibit A-9. The  
25 Interconnection Document currently mandates necessary standards, and can also be updated as  
26 needed. The ACC has had an open rulemaking on the issue since June, 2007 and Commission  
27 Staff indicated at the hearing on this matter that it could think of no safety requirement that was  
28 not already adequately addressed in the Interconnection Document. *See* Tr. 1279:20-22;

1           2) The Registrar of Contractors regulates the construction and quality of workmanship  
2 used in installing and operating solar facilities while also providing an outlet for customer  
3 complaints and remedies for inadequate workmanship. See A.R.S. § 32-1154;

4  
5           3) A.R.S. § 15-213.01 requires that all SSAs must provide actual savings to the schools  
6 on a yearly basis and requires repayment for any shortfall. This statute protects schools from not  
7 realizing promised savings through their solar systems and it renders rate regulation unnecessary;

8  
9           4) The RFP procedure that schools and governments must go through requires the  
10 solicitation of numerous bids and implements a competitive process that protects the schools and  
11 governments from paying inflated prices;

12  
13           5) The Attorney General's Consumer Fraud Office provides an outlet for consumer  
14 complaints and recourses against solar providers that would attempt to defraud or mislead  
15 customers.

16  
17           It is unclear how competition within the SSA market could lead to abuses detrimental to  
18 the public that are not already dealt with under existing regulatory frameworks. An affirmative  
19 demonstration of this critical question is necessary for the Commission to extend its authority to  
20 a new business.

21  
22 **IV. Regulation of SSA providers will be devastating to the SSA business and to any chance**  
23 **that schools have to save money by using solar energy**

24           The ROO also fails to adequately address the devastating impacts that regulation of SSAs  
25 will have on the ability of schools, governments, and other nonprofits to utilize solar energy.  
26 The complicated financial structure of the SSA requires that tax equity investors own the systems  
27 for at least five years in order to get the benefit of the tax and depreciation credits, after which  
28 the SSAs are designed to be saleable to other investors. See Tr. at 184:12-17. These tax equity

1 investors are often banks and insurance companies that have large tax equity appetites. *See* Tr. at  
2 104:14-17.

3 The testimony was clear that nationwide there are far more projects nationwide in need of  
4 tax equity investors than there is tax equity available. *See* Tr. at 104:25-105:1. SolarCity  
5 testified that this lack of tax equity is one of the largest constraints to the proliferation of solar.  
6 *See* Tr. at 104:25-105:1. As a result, banks and other tax equity investors can be very selective  
7 in the projects they choose.

8 Given this “buyers’ market” it is clearly undesirable for Arizona to create a situation  
9 where a given investor who has purchased a SSA contract could find themselves summoned  
10 before the Commission, subject to their investigatory powers, or potentially facing a “lite” form  
11 of regulation that evolved over the contract term to become less than “light”. This will cost  
12 schools, governments and other nonprofits millions of dollars in lost opportunity costs.

13 The testimony was clear that, in almost all cases, separate special purpose entities are  
14 involved in the ownership of each SSA. *See* Tr. 183:13-21. Each special purpose entity would  
15 need its own Certificate of Convenience and Necessity (“CC&N”) according to the ROO. Any  
16 company willing to purchase an SSA and subject itself to regulation would presumably also first  
17 have to file for and receive a CC&N in Arizona, which will delay sales opportunities and add  
18 transactional costs to every sale. This will limit the usefulness and attractiveness of SSAs as  
19 financial instruments and will be a deterrent to their adoption in Arizona.

20 It is also not a trivial question to ask how the ACC’s diligent yet already overworked staff  
21 can possibly handle the hundreds of new CC&N applications they would potentially be faced  
22 with every year?

## 23 24 **V. Regulation of such a narrow type of solar financing arrangement makes no sense**

25 If the ROO is adopted, then a school will be able to acquire solar equipment using any  
26 available financing options but the option that makes the most financial sense could only be used  
27 if the provider is regulated as a public service corporation. For example, according to the ROO,  
28 a school could purchase a solar facility and services from SolarCity, have SolarCity design the

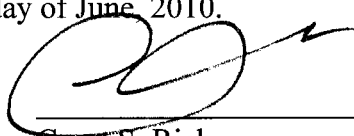
1 system, install the system, maintain the system, and even finance the system (provided the tax  
2 credits were not monetized through an SSA), and SolarCity would not be a regulated utility. In  
3 this instance the school will get exactly the same services and equipment it would get under an  
4 SSA (albeit for a much higher cost) and SolarCity would not be regulated as a PSC. What sense  
5 does this make?

6 In addition, regulation of only this form of financing in the name of protecting the public  
7 would be ironic since the pricing structure of a SSA is the most consumer-friendly pricing  
8 structure available in the market. The SSA is the only form of financing that ensures that  
9 customers will only pay for what they receive. The production risk falls entirely on the solar  
10 provider and if the system underproduces or altogether fails to produce the customer accordingly  
11 pays less or nothing at all. See Ex. A-4 at 7:16-22. It would be curious to find that the only  
12 regulated form of distributed generation is also the form that already best protects the customer.

## 13 14 **VI. Conclusion**

15 For the forgoing reasons SolarCity respectfully requests that the Commission overturn  
16 the ROO and adopt the proposed Amendment to the ROO attached hereto as Exhibit 1.

17  
18 Respectfully submitted this 10<sup>th</sup> day of June, 2010.

19  
20 

21 Court S. Rich  
22 M. Ryan Hurley  
23 Rose Law Group pc  
24 Attorneys for Applicant SolarCity Corp.  
25  
26  
27  
28



1 **Original and 13 copies filed on**  
2 **this 1<sup>st</sup> day of June 2010 with:**

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4 Arizona Corporation Commission  
5 1200 W. Washington Street  
6 Phoenix, Arizona 85007

7 I hereby certify that I have this day served the foregoing documents on all parties of record in  
8 this proceeding by sending a copy via electronic mail to:

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8  
9 Melvin R. Johnson

# **EXHIBIT 1**

**Amend the ROO by making the following changes:**

**Insert on p. 5 line 20 after the word "credits." the following:**

SSAs provide schools, governments, and non-profits with an affordable option for financing the costs associated with implementing solar power. SSAs are, more than anything else, a financing tool that allows these entities to acquire the use of solar equipment without up-front costs while putting to use otherwise stranded tax incentives.

**Delete p. 21 line 22 thru p. 25 line 5 and replace with:**

## 2. Analysis and Conclusions

Article 15, Section 2 of the Arizona Constitution provides that public service corporations are those that furnish electricity for light, fuel, or power. SolarCity argues that it is not "furnishing" electricity because the SSA provides that SolarCity never has title to the electricity that its solar equipment generates – it cannot transfer possession of what it does not own. Any furnishing of electricity that occurs under an SSA is incidental to the financing arrangement between SolarCity and its customer. Arizona Courts have found that a company that meets the textual definition of a public service corporation under the Constitution is not a public service corporation if it has a primary purpose that does not implicate the public interest such that regulation is warranted.

Put simply, SolarCity is primarily engaged in the business of providing solar equipment to customers. In fact, prior to the two school projects at issue in this matter, SolarCity either sold or leased solar equipment to every customer with whom it has done business with in Arizona tending to emphasize that the company is in the business of providing solar equipment to its customers and that it is not primarily in the business of selling electricity. *See Tr. at 194:1-7, 16-17.*

In fact, it is only by virtue of the fashioning of the Federal Tax Code that SolarCity's school, government, and non-profit customers have sought out SSAs at all. The SSA arrangement allows schools, as non-taxpaying entities, to take advantage of the 30% savings on solar equipment that the Federal income tax credit provides. It is clear that SolarCity's customers do not view the SSA as an agreement for purchasing electricity, but rather, view it as a financing mechanism as Scottsdale Unified School District's Deputy Superintendant, David Peterson stated:

"...everyone has to remember that there is no other economically viable way for us to make this work. If SUSD could purchase the system or lease it while taking advantage of the substantial tax incentives we would explore that but as has already been explained that does not work because of our tax exempt status. All SUSD wants are the services that SolarCity provides without regulation in this State right now which are design, installation, and maintenance of the system with no upfront costs. Because we are a school the only way we can employ these services at a

price that makes sense is through a SSA....If SUSD buys the panels then SUSD needs to come up with approximately \$10 million dollars just to install the solar system for the two schools. The SSA allows us the opportunity to get the solar panels in place and to begin saving money without spending anything up front. We are using SolarCity to raise the upfront costs for us and are paying for that based on the savings we ultimately receive from their installation. That is "financing" in its most basic sense."

Exhibit A-5, 13:1-20

If purchasing a system outright with cash on hand is not feasible for schools, they could sell bonds to pay for the purchase, employ traditional financing from a bank or other lender to buy the system outright, enter into a lease to own or simple equipment lease, solicit donations to fund or partially fund the purchase or lease of the solar equipment, or even apply for grants from a number of sources to fund portions of the purchase or lease. Each of these options is a viable alternative to SSAs.

However, in each of these situations, the school would have to pay an additional 30% for the equipment as compared to an SSA because it would have to forfeit the Federal tax credit and significant depreciation benefits that are available to taxpaying entities. *See* Exhibit A-4 at Peterson questions 8, 11; *see also*, A-4 at Rive questions 11, 13, 14. As Mr. Peterson explained, the schools evaluated their options and determined that the SSA provided the most cost-effective method for installing and financially benefiting from solar equipment.

We therefore find that the record does not support the notion that schools are primarily looking to purchase electricity from SolarCity. Instead, we find that the record supports a conclusion that an SSA is a tool for financing the installation and use of solar equipment. As discussed previously, an SSA is only one of many financing alternatives available. At the same time, it is the one of all of these alternatives that makes the most financial sense for schools, governments and nonprofits. Any furnishing of electricity that takes place by virtue of the SSA relationship is merely incidental to the primary purpose of providing a means to finance the solar equipment.

Additional analysis is therefore needed under *Serv-Yu* to determine if any electricity that may be furnished incidental to the financing arrangement creates a situation where the Constitution mandates that SolarCity be deemed a public service corporation under these facts.

**Delete p. 27 line 10 thru 19 and replace with:**

After careful examination of the case law, we find that we are required to perform the analysis set forth in *Serv-Yu* to determine if SolarCity is a Public Service Corporation. We find that SolarCity's provision of electricity under an SSA is an incidental

consequence of SolarCity's primary purpose of providing schools, governments, and other non-profits with a way to finance the acquisition of solar equipment. We find that the fact that the school, government, or non-profit could purchase the solar equipment under a number of different financing mechanisms but instead chooses to enter into the SSA in order to save money and take advantage of tax incentives is instructive as to the primary purpose of the SSA. We do not find any evidence to suggest that SolarCity's customers choose an SSA because they are looking to buy electricity from SolarCity; rather, we find that a class of customers chooses an SSA because it is effectively the most affordable way for them to acquire solar equipment.

**Delete p. 28 line 4 thru line 19 and replace with:**

The Courts have made it clear that in considering whether a given company is a public service corporation, the company must be evaluated using the criteria set out in *Serv-Yu*. See *Southwest Transmission Cooperative ("SWTC") v. Arizona Corp Comm*, 213 Ariz. 427, 430, 142 P.3d 1240, 1243 (App. 2007). The *SWTC* Court found that, "[d]etermining whether an entity is a public service corporation requires a two-step analysis." *Id.* (emphasis added). In *Nicholson*, the Supreme Court found, after application of the *Serv-Yu* criteria, that a joint venture that provided water to purchasers of spaces in a mobile home park was not a public service corporation, despite an inarguable "furnishing" of water. This was decided because the provision of water was incidental to the sale of the spaces which was the primary business of the joint venture. See *Arizona Corp Comm. v. Nicholson*, 108 Ariz. 317, 320, 497 P.2d 815, 818 (S.Ct. 1972). The *Nicholson* Court made it clear that there was more to the analysis than whether the entity met the exceedingly brief textual definition of a public service corporation, stating:

To be a public service corporation, its business and activity must be such as to make its rates, charges, and methods of operations a matter of public concern. It must be, as the courts express it, clothed with a public interest to the extent clearly contemplated by the law which subjects it to governmental control....It was never contemplated that the definition of public service corporations as defined by our constitution be so elastic as to fan out and include businesses in which the public might be interested incidentally.

*Id.* 108 Ariz. at 321, 497 P.2d at 819 (citing *General Alarm v. Underdown*, 76 Ariz. 235, 238, 262 P.2d 671, 672-73 (1953))

Later, the *Southwest Gas* Court affirmed that *Nicholson* announced that "meeting the literal textual definition [of a public service corporation] is insufficient" to find that an entity is a public service corporation. *Southwest Gas Corp. v. Ariz. Corp. Comm.*, 169 Ariz. 279, 286, 818 P.2d 714, 721 (App. 1991).

Arizona law clearly mandates that we apply the criteria set forth in *Serv-Yu* in analyzing this matter. The *Serv-Yu* analysis will resolve whether or not an incidental or ancillary provision of electricity will cause SolarCity to be defined as a public service corporation under the Constitution.

**Delete p. 31 line 6 thru p. 32 line 18 and replace with:**

Here, SolarCity is in the business of designing, installing, maintaining, and sometimes financing solar equipment. None of these actions cause or trigger regulation as a public service corporation, when carried out either individually or together.

SolarCity has devised a number of different financing methods through which it brings its design, installation and maintenance services to the public; one of these methods happens to be the SSA. It is important to note that prior to this case, SolarCity only sold or leased solar equipment in Arizona and did no SSA transactions. *See* Tr. at 194:1-7, 16, 17. As a result, the company never furnished electricity to any customer, incidentally or otherwise. The evidence suggests that SolarCity is merely trying to bring its traditional design, installation, and maintenance services to Arizona schools by utilizing a SSA to take full advantage of Federal tax incentives. *See* Ex A-5 at 5:28-6:12

In deciding what SolarCity actually does, it would be a mistake to focus exclusively on one component of the SSA, as urged by Staff, TEP and SRP. It would be entirely too facile to claim that a multifaceted contract, contemplating long-term operations and maintenance services, end-of-term ownership and renewal options, as well as a wide variety of other factors, from a company who also provides significant numbers of non-financed systems, is “actually” providing commodity electricity. *See* Ex A-1 at Ex B at Ex 7.

Instead, we view this case as similar to the issues that the *Nicholson* Court faced. In *Nicholson*, there could be no mistaking that the company actually furnished water to residents of a trailer park for their domestic use and consumption – yet the Supreme Court found that the company was not a public service corporation. *See Nicholson*, 108 Ariz. at 320, 497 P.2d at 818. The Court found that while the provision of water to those purchasing lots in a trailer park was necessary to sell the lots, the primary purpose of the company was to sell lots, not furnish water. *See Id.*

We find that situation to be analogous to the situation at hand. SolarCity is not an electric company. It is a company that designs, installs, maintains and sometimes finances solar equipment. *See* Ex. A-4 at Q. 10. The company by no means finances all of the equipment it provides in Arizona, and where it does provide financing, it provides only a portion of this through the SSA at hand (with the majority through a lease structure that no party has argued would trigger the jurisdiction of the ACC).

Further, we find it would strain credulity for us to conclude that of two providers, having built, owned and contracted for the maintenance of two identical solar systems across the street from one another – one leased (with a kWh production guarantee) and one under an SSA at identical pricing—that in the case of the latter, what the company “actually does” triggers ACC jurisdiction, whereas the former does not.

The mere fact that the Federal Tax Code requires a school to enter into an SSA in order to fully take advantage of Federal tax credits does not change SolarCity's core business such that it suddenly becomes a company primarily concerned with selling electricity.

**Delete p. 36 line 5 thru p. 37 line 11 and replace with:**

The second *Serv-Yu* factor requires an examination of whether the entity has dedicated its property to a public use, and is a question of intent shown by the circumstances of the individual case. *See SWTC*, 213 Ariz. at 431-33, 142 P.3d at 1245-46

In this case, SolarCity's business is to design, install, maintain and occasionally finance solar equipment. Unlike cases like *SWTC*, where the transmission company provided power that would ultimately serve thousands of homes (3.8% of the population of Arizona. *See*, Commission's Decision 66835) or even *Nicholson*, where the entity was providing water service to multiple lot owners in a community, SolarCity provides only equipment and services to a single customer for a single solar installation, according to individually negotiated contracts.

SolarCity's intent in contracting with schools is not to sell electricity but rather to offer a financing mechanism that allows the schools to take advantage of SolarCity's design, installation, maintenance and financing services. SolarCity's CEO, Mr. Lyndon Rive, testified that:

You have to understand that there is simply no other economically viable way for schools, non-profits and governmental entities to utilize our unregulated services that we provide all over the state unless they use the SSA. All SolarCity is doing is trying to provide this class of non-profit customers with its core, unregulated services. If it means we somehow end up furnishing electricity then that is purely incidental. SolarCity never decided to change its business plan and start selling electricity. Instead, SolarCity tried to figure out a way to bring this class of non-profit customers its legal services and the SSA is the only way to do that. We have no reason to change our business plan as we have been highly successful. If we are furnishing electricity, which I do not agree with, it is merely incidental to us utilizing the only viable way to provide the unregulated services the non-profit group can benefit from.

Ex. A-5 at 5:28-6:12.

Clearly, the provision of renewable energy is a public policy interest of the State, as evidenced by the REST rules themselves. However, we do not find that every company engaged in an activity encouraged by public policy is therefore "dedicated to the public use" and subject to detailed regulation and oversight by the State body dedicated to prevention of monopoly abuse. If the criteria for "public use" were only to examine whether the State has sought to encourage a given business activity or development, it would be difficult to find an area of enterprise *not* subject to Commission jurisdiction.



To find that a privately negotiated contract for services with what is currently a vanishingly small, and necessarily forever circumscribed percentage of Arizona electric customers, represents a "dedication to public use" or is "integral" to the provision of reliable electric service to the rest of the state, is inconsistent with the meaning of the term, and we decline to do so.

Rather, it seems clear that SolarCity does not intend to provide schools or other nonprofits with services or products that differ from what it provides to homeowners and businesses around Arizona, all without Commission oversight. The circumstances of this case and the basic facts presented indicate that there is no dedication to a public use within the scope of SolarCity's provision of solar services to non-profits in Arizona.

**Delete p. 38 line 19 after the words, "of the corporation." and replace with:**

In any event, SolarCity's Articles of Incorporation are materially different from those of other public service corporations entered into evidence in this matter. It is true that SolarCity's Articles of Incorporation do not preclude its acting as a public service corporation but they do not, like all other public service corporations' Articles that were made part of the record, reflect an intent to operate as a public service corporation or to furnish electricity to the public. While we do not attach great weight to this factor in our evaluation, we find it favors SolarCity's position that it is not a public service corporation.

**Delete p. 43 line 18 after "plants" thru p. 44 line 9 and replace with:**

However, the same could be said of any electron placed onto the grid, whether from a regenerative elevator or from a solar system sold for cash. To claim that placing a single electron on the grid places a party in the business of providing "essential" electric service is to ignore the meaning of the term "essential."

Our Supreme Court has held that the fact that a company is dealing with a commodity in which the public has been held to have some interest does not necessarily mean that regulation is necessary or appropriate or results in a dedication to a public use. See *Nicholson*, 108 Ariz. at 320, 497 P.2d at 818.

We find that while the provision of distributed solar generation is desirable, it is not an essential public service in which the public has generally been held to have an interest. In making this determination, we are not distinguishing between electricity generated by renewable resources and non-renewable resources, but rather are distinguishing between traditional off-site generated electricity and electricity generated on a customer's premises, behind the customer's meter, and implemented at the customer's subjective prerogative while that customer remains connected to, and able to receive all needed electricity from, the grid.

**Delete p. 47 line 2 thru line 20 and replace with:**

The fifth *Serv-Yu* factor looks at whether SolarCity is a monopoly or intends to monopolize territory. The existence of a monopoly provider of essential public services tends to suggest that such an entity should be subject to regulation to protect the public's interest in receiving reliable service at a reasonable price.

SolarCity is not a monopoly and does not have market power; the company competes for business, when taking part in an RFP process. Thus, the need to regulate rates is not the same as with a traditional monopolistic utility service.

It is unavoidably true that once two private parties have negotiated a long-term contract, especially one involving large capital equipment, that they will experience reduced bargaining power with one another. The customer of the equipment would find it difficult or expensive to remove or replace the equipment if service should be wanting, while the provider would similarly encounter not insignificant financial obstacles if customer payment should be absent. This is a fundamental aspect of long-term contracts, and applies across broad swathes of the economy that are rightly not subject to public regulation. We fail to see, and reject the invitation of those urging us to assert jurisdiction to find, that a sort of "mini-monopoly" requiring Commission regulation can be created within the scope of a contract between two private parties.

**Delete p. 51 line 3 starting with the word "While" thru p. 51 line 14 and replace with:**

The nature of an SSA requires individualized pricing based on the specific design of panels to fit with the unique characteristics of a customer's roof. In addition, the nature of the RFP process gives the customer especially strong bargaining power and the ability to demand individualized terms.

The important part of the analysis here is not so much that SolarCity clearly provides services under individualized contracts, but rather that SolarCity *only* provides service under such contracts. The fact that these contracts tend to be based on generally standard templates should be accorded no consideration in this determination, as the same could be likely said of the vast majority of contracts in most comparatively mature industries.

Public service corporations under our jurisdiction sometimes serve some customers under individual contracts, but they do not serve all customers under such contracts. While the determination of this factor is, like the other *Serv-Yu* factors, not in and of itself controlling on the issue of public service corporation status, we find that this factor weighs against finding SolarCity to be under our jurisdiction.

**Delete p. 53 line 23 thru p. 54 line 11 and replace with:**

After analyzing the *Serv-Yu* factors we find that SolarCity is not a public service corporation. Under the *SWTC* language, it is not possible for us to determine a

distinction between SolarCity's service under an SSA, under a lease, or under a cash purchase such that in the case of the SSA there is a, "disparity in bargaining power between the service provider and the utility ratepayer is such that government intervention on behalf of the ratepayer is necessary." *SWTC*, 213 Ariz. at 432, 142 P.3d at 1245.

SolarCity is not a business engaged in the sale of electricity. SolarCity is a business engaged in the design, installation, maintenance and financing of solar equipment. It is only by virtue of the workings of the Federal tax code that SolarCity may incidentally be furnishing electricity when utilizing an SSA.

The fact that only a certain class of not-for-profit customers can take advantage of these otherwise unregulated services through use of the SSA arrangement does not fundamentally change SolarCity's business. SolarCity offers schools, governments and other nonprofits an affordable alternative to buying solar systems. This alternative allows them to take advantage of, and use, solar equipment without an initial outlay of capital. The schools get nothing more and nothing less from SolarCity than they would otherwise get if they purchased or utilized some other financing mechanism to acquire the solar equipment.

Further, we cannot, in the face of a well-documented competitive RFP for services in a thriving competitive market, find that the customers of these SSAs require governmental protection from an inherently unbalanced "natural monopoly" – nor that solar energy service is 'indispensable' to the population.

Regulating SolarCity does not serve the public interest under the balance of these factors.

**Insert on p. 66 after line 14:**

Analysis:

We find that in all matters potentially affecting the public interest, SolarCity is currently under the aegis of adequate regulatory oversight and protection from one or another overseeing body.

The public's interest in a safe and reliable grid is adequately served through existing interconnection and operation regulations. Additional selective regulation of SolarCity as a public service corporation cannot be reasonably expected to lead to greater protection. Our Staff even noted that they could think of no additions that are needed to the Interconnection Document to improve the safety of the public and the grid at this time. *See* Tr. 1279:20-22.

The Commission's Interconnection Document ensures that all interconnecting distributed generation facilities meet required standards that guarantee public safety and grid

security. If, at some future date, we learn of additional safety measures that are desirable to ensure a greater level of safety for the public and the grid, then the Commission can modify the Interconnection Document and later its Rules as those are finalized to include such measures.

The Registrar of Contractors provides comprehensive oversight and quality control of a given SSA's construction practices and the Attorney General is capable of dealing with consumer fraud concerns. In the case of merely poor (as opposed to fraudulent) service, the record has clearly demonstrated that SSA provider SolarCity would face the ultimate sanction – loss of business in a fully competitive marketplace – and that its would-be customers would have this alternative available to them. We hesitate to extend our special jurisdiction into a new industry where this competitive mechanism is very much in operation.

Further, the unnecessary regulation of this industry under these circumstances would make doing business in Arizona disproportionately difficult compared with other States where no regulation is present. The record reflects that banks and insurance companies are often owners or partial owners of SSAs and that SSAs are often sold after the initial owner realizes the benefits of the tax credits and depreciation. Further, a company like SolarCity is apt to form different entities to own different SSA funded projects. Regulation would therefore potentially stymie this industry as the requirement to get a Certificate of Convenience and Necessity ("CC&N") for each entity, and to have banks and other financiers submit to regulation in Arizona would drive SSA providers to do business in States with lower transaction costs and greater certainty. Any attempt to sell an SSA would be frustrated and possibly terminated when the purchaser realizes it must file for a CC&N in Arizona.

As a result, regulation under these circumstances will work against the Commission's stated goals of encouraging the implementation of solar and other renewable energy projects in Arizona and will particularly damaging to the ability of our struggling schools to reap the millions in potential savings that the solar option provides. We are interested in building and creating a market that supports the implementation of solar and does not frustrate its growth with unnecessary and legally unwarranted regulation.

**Delete p. 66 line 16 thru p. 68 line 17 and replace with:**

Based upon our analysis of the Arizona Constitution and relevant case law, we find that SolarCity is not acting as a public service corporation when it enters into SSAs to provide its services to schools, governments and other nonprofit entities.

## **FINDINGS OF FACT**

**15. Delete and replace with:** The SSA is primarily a financing arrangement that allows schools, governments and other nonprofit entities to take advantage of the benefits of the Federal income tax credit and grant while implementing solar at their facilities. While

the school, government, or other nonprofit entity could choose another method to finance the acquisition of solar equipment, those other methods would result in higher costs as a result of the failure to utilize the tax credit. Under the SSA, SolarCity designs, installs, maintains and finances solar equipment and the customer becomes the owner of all electricity the solar installation produces.

**17. Delete and replace with:** The customer pays SolarCity an amount based upon the kWh production of the solar equipment.

**19. Delete**

**20. Delete and replace with:** The energy from the sun's rays hit the solar panels which transform that energy into DC current. This DC current is later transformed into AC current in an inverter between the panels and the customer's electrical service entrance.

**21. Delete**

**22. Delete and replace with:** SolarCity provides its customers with design, installation, maintenance and financing services; its furnishing of electricity is incidental to its attempt to provide these services to schools, governments, and other nonprofits.

**23. Delete**

**27. Delete and replace with:** The Commission has adopted the Interconnection Document as the standard to govern the interconnection of solar facilities to the grid and is in the process of making Rules to further regulate interconnections and through the Interconnection Document currently and the Rules in the future, the Commission is able to protect the public safety and welfare as well as the reliability and safety of the electric grid.

**28. Delete and replace with:** Electric customers rely on electricity from the public electric grid, while individual customers do not need and are not required to implement customer sited distributed solar generation on their premises.

**30. Delete all words following "corporations" in lines 20, 21.**

**31. Delete**

**33. Delete**

**34. Delete and replace with:** Entities that purchase or lease (including the lessor and lessee in such transactions) distributed solar panels to produce electricity for use on their personal property are not public service corporations, as they do not furnish electricity under the Arizona Constitution, Art. 15, Section 2.

### 35. Delete

#### CONCLUSIONS OF LAW

1. **Delete and replace with:** SolarCity is not a public service corporation and the Commission does not have jurisdiction over SolarCity when SolarCity acts pursuant to an SSA entered into between SolarCity and a school, government or nonprofit entity.

3. **Delete and replace with:** Under an SSA, SolarCity is only incidentally furnishing electricity to its customer as a result of the chosen financing method by which SolarCity provides its design, installation and maintenance services. The SSA contract does not make SolarCity's actions a matter of public concern nor does it denote a public interest such that Commission regulation is necessary or desirable.

4. **Delete and replace with:** The analysis of facts of the case under *Serv-Yu* is required under Arizona law.

5. **Delete and replace with:** The weight of the *Serv-Yu* factors lead to the determination that when SolarCity designs, installs, maintains and finances solar equipment for use on the premises of schools, government and nonprofits, its activities are not clothed with a public interest and SolarCity is not acting as a public service corporation.

6. Insert the word "not" after the word "is" and before the word "acting" in line 27.

### 7. Delete

#### ORDER

**Delete following the word "Corporation" in line 7 of page 73 thru the end of line 9 on page 73 and replace with:** "enters into a Solar Services Agreement as described herein with a school, government, or nonprofit entity, SolarCity is not acting as a public service corporation.

**Delete remaining text after line 10, p. 73.**

**Make all conforming changes.**

## **EXHIBIT 2**

**Exhibit 2**

Non-Profit Customers: System Attributes by Financing Method					
	Design of Facility		Installation of Equipment		Monetize Tax Credit
			Ongoing Maintenance	Equipment Produces Electricity	
1. Purchase for cash	yes		yes	yes	no
2. Finance with bond sales	yes		yes	yes	no
3. Acquire with grant money	yes		yes	yes	no
4. Finance with equipment lease	yes		yes	yes	no
5. Finance with lease to own	yes		yes	yes	no
6. Finance with bank loan (traditional financing)	yes		yes	yes	no
7. Raise private donations	yes		yes	yes	no
8. Finance with SSA	yes		yes	yes	yes